

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

ROBERT CYRUS,)	
)	
Plaintiff,)	
)	
vs.)	Civil Action No.: 2:06-cv-568-WKW
)	
HYUNDAI MOTOR COMPANY,)	
et al.,)	
)	
Defendants.)	

REPLY BRIEF

In response to Plaintiff's motion to strike Defendant HMMA argues that the Court had in essence converted the motion for judgment on the pleadings to a motion for summary judgment by including language in its order that the plaintiff's response should include evidentiary materials. For this Defendant cites *Garcia v Copenhaver*, 104 Fed 1256, 1266 n.11 (11th Cir.1977) as supporting authority. *Garcia* does not say this. *Garcia*, in footnote 11, relies upon *Marine Coatings of Alabama, Inc. v. United States*, 792 F.2d 1565, 1568 (11th Cir.1986). *Marine Coatings* says that the Court must inform the parties that it is converting the motion to a summary judgment motion. It says:

The cases from this circuit are clear that before a motion to dismiss may be converted to one for summary judgment the court must first communicate its intention to the parties to so treat the motion and then allow the parties ten days to submit any relevant evidence and argument in support or opposition to the merits. *See Milburn v. United States*, 734 F.2d 762, 766 (11th Cir.1984).

Marine Coatings at 1568.

Here the Court did not indicate that it was converting the motion to a summary judgment motion, so Defendant's argument is not supported by the law.

Defendant also argues that it's inclusion of evidence outside the pleadings was merely to

provide the Court with documents that Plaintiff “generally references in the Complaint”. For that It cites *Townsend v. Columbia Operations*, 667 F.2d 844, 848-9 (9th Cir,1982), 5 Wright & Miller, Federal Practice and Procedure § 1327 at 762-3 (2nd ed. 1990) and *Romani v. Shearson Lehman Hutton*, 929 F.2d 875 n.3 (1st Cir.1991). None of those authorities apply here. In each of those cases the documents outside the pleadings were undisputably referenced by the pleadings. That is not the case here. Plaintiff has specifically denied that the ERISA plans were the benefits he referenced in his complaint. So the cases cited do not support Defendant’s argument.

For these reasons together with those cited in the *Motion To Strike*, Plaintiff requests the Court strike Defendant’s evidentiary submission and those parts of its brief relying on evidence.

Respectfully submitted

s/Richard J. Stockham III
ASB-5599-k43r
Attorney for the Plaintiff
Stockham, Carroll & Smith, P.C.
2204 Lakeshore Drive, Suite 114
Birmingham, Alabama 35209
Telephone (205) 879-9954
Fax: (205) 879-9990
E-Mail: rjs@stockhampc.com

Civil Action No.: 2:06-cv-568-WKW

2204 Lakeshore Drive, Suite 114

Birmingham, Alabama 35209
Telephone (205) 879-9954
Fax: (205) 879-9990
E-Mail: rjs@stockhampe.com